

BARBARA MÁGÓ

Ways of protection granted by citizenship

Introductory thoughts

The national security challenges of the last decade have been the subject of a search for answers by practitioners, academics and politicians alike. Although the preventive and retaliatory measures implemented by states vary across Europe, a new trend and a new set of tools is emerging in the jurisprudence. Recently, a number of European states have revived or transformed their existing rules on deprivation of nationality in accordance with a national security perspective; citizenship revocation has begun to function as a kind of alternative means of protection against undesirable members of the nation state who pose a threat to national security. To date, the revocation of citizenship has been used mainly against dual nationals who have joined terrorist organizations, preventing them from returning home, but they are not the only ones whose expulsion could be of public interest in future if that makes them harmless¹. Such an attempt to address security concerns implies a clear shift in the immigration and, in particular, citizenship *acquis* towards criminal law. This paper will attempt to analyze the protective function of citizenship, the possibilities and limitations of citizenship deprivation and the concerns that arise in the process of deprivation.

¹ Sheng, E. E.(2023): The moral permissibility of banishment. *Law and Philosophy* 42(3), 285-310

The protective function of citizenship

The fundamental characteristics of citizenship are equality, security, protection and stability. At the end of the naturalization process, foreign nationals take an oath of allegiance and the state accepts them as citizens, guaranteeing them a range of economic, cultural, social and political rights. This stable and peaceful relationship alters when the naturalized person – as a 'bad citizen' – commits a crime or an act that threatens the security of the country. Recently, many states have revised their citizenship laws on the grounds of public and national security interests and the threat of terrorism, reviving the institution of deprivation, which has been dormant or even forgotten since the end of the world wars and regime changes.

What is the role of citizenship in protecting the state, and how can a constitutional or administrative legal institution fulfil a national security or criminal law function? In this sense, citizenship status is nothing more than a guarantee against expulsion and thus a guarantee of staying in the country. As a main rule, a person who is a national of a state should not be expelled from the territory of that state, and is free to leave it and may return at any time. By examining the inverse of the claim, it can be established that a person who is not a national can be expelled and may be kept away from returning to the country. Deprivation therefore means that the individual loses the right of stable residence, and at the same time becomes a foreigner again, a subject to alien law, and ultimately obliged to leave the country. The effect of deprivation of nationality is the swift and effective exclusion of undesirable citizens who pose a risk to national security. The protective role of citizenship is thus twofold: on the one hand, it protects the citizen from exclusion and, on the other, it can protect the state from the non-citizen offender, if this function is justifiably exceeded.

The overt purpose of deprivation is therefore a reaction by the State, outside the criminal law, to the individual's criminal act. Given that expulsion is a known criminal penalty as well, which can be imposed alone or in addition to other penalties, it is also a procedure and a legal consequence

of a criminal nature when it is used for expulsion or to prevent the return to the country. In addition to its individual, overt, punitive purpose, deprivation also acts in the interests of national security, since specific, individualized retribution also has a general deterrent effect. Citizenship deprivation is also, somewhat implicitly, a means of enhancing the subjective sense of security of the population, of maintaining sovereignty and of protecting national values and interests.

Deprivation practices in European countries

Over the past decade, a number of European states have introduced citizenship deprivation practices for national security purposes. These deprivation policies have so far primarily targeted individuals linked to terrorism, in particular to defend against so-called "returning fighters"². However, given international trends in citizenship deprivation, it is predicted that this legal instrument could, through confidence in its effectiveness, be extended to other undesirable cases of persons who have committed offences of particular material gravity.

In a study published in early 2023, Milena Tripkovic analyzed the deprivation of liberty practices in 37 European states (27 EU states, candidate countries, EEA countries and the United Kingdom). Out of the 37 countries surveyed, 15 (Albania, Croatia, Czech Republic, Hungary, Iceland, Liechtenstein, Lithuania, Luxembourg, Northern Macedonia, Poland, Portugal, Serbia, Slovakia, Spain and Sweden) do not currently apply the sanction of deprivation, while 7 (Bulgaria, Denmark, Finland, Italy, Latvia, Norway and Turkey) only apply the institution in cases of criminal responsibility for crimes against the state, crimes against humanity and terrorism, while the remaining 15 states (United Kingdom, France, Germany, Austria, Belgium, Estonia, Greece, Ireland, Romania, Switzerland, Cyprus, Malta, Netherlands, Slovenia and Montenegro) have a relatively wide scope of

² Returning foreign fighters are people who wish to return to the European state of their nationality after their voluntary participation in a Middle East conflict.

revocation for acts that are detrimental to public and constitutional order. Moreover, the UK and Italy allow the deprivation of nationality even if it results in statelessness, contrary to internationally accepted legal principles³. Official statistics also show that the number of withdrawals is on the rise. At the beginning of 2022, there were 6 revocations in Denmark, 16 in France, 21 in the Netherlands, 52 in Belgium and 212 in the United Kingdom⁴. According to the above study and statistics, the typical migration destinations that lead the way in revocations are the states which have high proportions of citizens from different cultures, immigrant backgrounds, mostly with dual citizenship, and which themselves have recently suffered serious terrorist attacks resulting in dozens of deaths.

The United Kingdom leads the list both in terms of the sophistication of its jurisprudence and the number of people deprived of their rights. A legally acquired relationship by public law, whether inherited or acquired by naturalization, can be dissolved in the "public interest" with almost no procedural guarantees, i.e. the status can be revoked, even if the person becomes a stateless person. The undeserving citizen must therefore always face the prospect of disenfranchisement under British law, a procedure which many experts and legal scholars regard with alarm. Although Belgian naturalization rules are among the easiest and most welcoming in the European Union, multiple nationals who are in breach of their civic duty can be deprived of their Belgian nationality, and therefore their EU citizenship, *in absentia*. In France, deprivation is only possible for naturalized persons within 15 years of acquisition, in cases where there is no risk of statelessness. In 2019, Germany introduced a rule that best protects human

³ Tripkovic, M. (2023): Renouncing criminal citizens: Patterns of denationalization and citizenship theory. *Punishment & Society* 25(2). 363-385

⁴ Source: https://files.institutesi.org/Instrumentalising_Citizenship_Global_Trends_Report.pdf

Accessed: 20.07.2023

rights, respecting the rule of law and proportionality⁵, which allows deprivation only for multiple nationals, in cases involving an adult, as a result of an act related to terrorism, after the entry into force of the law.

Following the example of Western Europe, more and more states are reviving their old, sanction-based citizenship deprivation rules. Although the number of revocations is not yet significant, the legal provisions allowing them are changing in an increasingly stringent spirit, and the courts typically uphold these administrative decisions. However, on 22 March 2023, Denmark's Supreme Court issued a landmark annulment ruling, declaring a decision to revoke the citizenship of a Danish-Iranian dual national woman who had joined ISIS to be disproportionate. This is also crucial because the same court had reached the opposite conclusion in a similar case five months earlier⁶. While this decision appears to be a step forward in Denmark's deprivation of citizenship, it also pioneered a new direction in citizenship restrictions. In 2020, Denmark adopted an amendment to its law prohibiting the transfer of citizenship by descent to children of Danish parents in conflict zones, citing a lack of attachment to Danish values⁷. Although the possibilities and conditions of the restriction of the *ius sanguinis* principle, one of the main regulating principles of citizenship, and the relation between it and the legal institution of absence, which is also known in the history of Hungarian citizenship law, are not the subject of this article, it should be noted that the above restriction is as discriminatory for certain citizens as the prevention of free return by deprivation.

⁵ Joppke, C. (2016): Terror and the loss of citizenship. *Citizenship Studies* 20(6-7). 728-748

⁶ Prener, C. (2023): Citizenship Revocation and the Question of Proportionate Consequences: Latest Judgement from the Danish Supreme Court Sheds New Light on the Limits of Article 8 of the European Convention on Human Rights. *Statelessness and Citizenship Review*

⁷ Source: https://files.institutesi.org/Instrumentalising_Citizenship_Global_Trends_Report.pdf

Accessed: 20.07.2023

An examination of the jurisprudence of European states therefore shows that national security interests are often clearly predominant over individual rights, which suggests that expulsion policy will remain the last bulwark of national sovereignty for a long time to come⁸.

Concerns about the withdrawal of citizenship

The Universal Declaration of Human Rights provides that the right to a citizenship is a fundamental human right. Citizenship establishes the legal relationship between the state and the individual, which confers to the natural person a number of rights and privileges, including the guarantee of individual security. Perhaps the most controversial question about deprivation is whether it violates the fundamental human right to a citizenship. Since most states do not provide for the possibility of deprivation of citizenship by descent, but only after naturalization in the case of dual or multiple citizens, the right to a nationality is not in principle violated, since the individual does not become stateless.

However, another question is whether the practice of distinguishing between the acquisition of a legal obligation and the categories of sole and multiple citizens is morally correct and in line with the principle of equal treatment. Multiple relevant but far-reaching examples and analogies can be drawn to highlight the weight of these issues. If a naturalized person can be punished more and more severely for what he has done, is it true that society really expects more and better from him than from his natural-born compatriots? Using the example of a millennium-old legal institution, should a legal distinction be made between 'adopted' and 'natural' children? And should it be allowed when the adopted child attacks the adoptive family?

⁸ Gyenei, L. (2023): Uniós polgárok kiutasítása más EU tagállamból az Európai Bíróság legújabb gyakorlatában [Expulsion of EU citizens from another EU Member State in recent case law of the European Court of Justice] II. Belügyi Szemle, 2023/3. 404

As mentioned above, acquiring citizenship is a pledge of final arrival in the life of the foreigner and a guarantee of unconditional residence in the country of choice. The subsequent deprivation of naturalized persons may therefore infringe legal certainty, the principle of equal treatment, the protection of acquired rights and the prohibition of retroactive legislation. As it is commonly known, a fundamental right may be restricted only to the necessary extent and proportionate to the exercise of another fundamental right. In the present case, the right to life, liberty and security of the wider population is in conflict with certain rights of the naturalized person, in particular the right to free return, which, in addition to the above, also affects the prohibition of discrimination, equality before the law and, ultimately, the right to family life and social security. The focus of the assessment of harm should be on the arbitrariness of the deprivation, but no precise definition of arbitrariness can be found in any of the normative texts. The divergent jurisprudence of the states can be traced back to divergent interpretations of the law, partially generated by the lack of a universal definition. Although the direction in which the law has developed regarding the sanctioning features of nationality may be parallel in several places, we are aware that this branch of the law has historically existed within the framework of national sovereignty, so that uniformity in the form of an EU directive, for example, cannot be expected. Each state codifies by its own values, traditions and legal policy objectives. However, the principles of international law and certain conventions should certainly be recognized as binding in national legislation.

Procedural unfairness is also a common argument against deprivation, as it imposes criminal sanctions without guaranteeing all the basic principles of criminal procedure. Immediately preventing a person from returning home may also violate the presumption of innocence, the right to appeal or to go to court, the right to personal presence and the right to adequate defense. We should take note of the fact that the key concept in the field of terrorism and national security is risk assessment, so the mentioned guarantees may not even come into consideration anyhow. However, although

deprivation of nationality can be based on a risk assessment and a completed offence, and carries a sanction similar as in criminal law, in most countries it is considered as a public administration procedural or purely administrative measure, with limited application of the aforementioned principles. It is precisely by taking advantage of these differences that it has been able to achieve its effectiveness and become a swift, cost-effective, yet sufficiently dissuasive legal sanction in European countries.

Although citizenship and aliens' rights instruments can, from a law enforcement point of view, create the conditions for expelling or preventing the entry of foreigners, it is nevertheless worth considering whether these instruments are more appropriate than the creation of legal and social opportunities that effectively promote the integration/reintegration of foreigners⁹. The subsequent exclusion of naturalized persons from citizenship could undermine the fundamental values of this status, and the loss of finality and stability could transform the role of citizenship, reduce its value, and make the protective function of citizenship more nuanced from the perspective of the naturalized citizen, while the relationship between rights and obligations in the national security interests of the state could become clearer.

Summary

Contrary to the popular prediction that citizenship is becoming less important in a globalizing world¹⁰, we see that citizenship remains a key factor in the 21st century. These two phenomena are both illustrated by the fact that nowadays the citizenship of certain states and the value of their travel documents are internationally ranked, thus confirming the globalized, open

⁹Hautzinger, Z. (2015): A terrorizmus elleni küzdelem idegenjogi eszközei [Foreign law instruments in the fight against terrorism]. Pécsi Határőr Tudományos Közlemények XVI. Pécs. 212

¹⁰ Shachar, A. et al. (2017): Introduction: citizenship - quo vadis?

Source: <https://academic.oup.com/edited-volume/28089/chapter/212162383?login=true>

Accessed: 20.07.2023

and travelable nature of our world and the power and prestige of belonging to certain national communities.

Modern experiences as well as the fear of the devastating effects of terrorist attacks and the true risk of radicalization of naturalized persons have led many states to resort to non-criminal means to guarantee security. The trend of deprivation of citizenship is likely to continue in the future unless the threat to national security is reduced¹¹. The example of Denmark, which restricts the descendant principle, also outlines a new direction for the protective shield function of citizenship law. When introducing a possible Hungarian regulation, it is worthwhile to follow the good practices of countries that are already at the forefront of revocations and that also meet human rights requirements, and to use the successes achieved there in developing and improving our own national security systems. In addition, we should also look for further instruments. Above all, efforts should be made to identify potential national security risks at the pre-citizenship stage, during the aliens' registration and naturalization process, and to facilitate the integration of foreigners who have been living here for a longer period.

¹¹ Sangeetha, O., - Williams, G. (2017): Twenty-first century banishment: citizenship stripping in common law nations. *International & Comparative Law Quarterly* 66(3). 521-555